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No. 03-95

IN THE

Supreme Court of the United States

ERIC D. EASTON, WILLIAM D. BAKER, ERIC B. PRENDERGAST, VIRGINIA SMITH ELLIOTT, AND THE PENNSYLVANIA STATE POLICE,

Petitioners,

v.

NANCY DREW SUDERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37(2)(b), the Chamber of Commerce of the United States ("the Chamber") respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari in this case. The written consent of the petitioners has been filed with the Clerk of the Court. Counsel for the respondent has refused to consent to the filing of this brief.

The Chamber is the nation's largest business federation representing an underlying membership of more than three million businesses and professional organizations of every size, in every sector of business, and in every state. As the principal voice of American business, the Chamber regularly advocates the interests of its members in court on issues of

critical concern to the business community. This case is important to the Chamber and all of its members, as it has significant implications for the workplace and employers' ability effectively to monitor harassment.

As a direct result of the incentives crafted by this Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), employers have made great strides in training managers and co-workers in what constitutes appropriate conduct in the workplace. The Third Circuit's decision in *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *cert. pending* (No. 03-95), threatens, however, to undermine the incentives put in motion by *Faragher* and *Ellerth*, for it broadens the concepts of "tangible employment action" to include employee resignations that a court later characterizes as amounting to a "constructive discharge." Because a quit is inherently different than a termination, (i.e., constructive discharge law does not require notice to the employer before an employee quits), the employer community is concerned that if the Third Circuit's approach were widely followed, a perverse dynamic would be created. Employees, more interested in boosting the value of their claim than fixing the underlying problem, would have an incentive to resign in lieu of remaining employed and providing notice, thereby impeding an employer's ability to remedy the situation.

In filing a brief as *amicus curiae*, the Chamber seeks to supplement, rather than duplicate, petitioners' arguments. While petitioners certainly assert a similar interest in this appeal, they necessarily do so from the far more limited perspective of litigants in a particular organization seeking to protect their interests in this case-specific context. The Chamber, in its *amicus* brief, provides this Court with the broader perspective and concerns of the overall American business community. In light of the Chamber's special vantage, the Chamber's brief plainly falls within the category of submissions likely to aid the Court's work because it "'inform[s] the court of interests other than those represented by the parties, and . . . focus[es] the court's attention on the broader implication[s] of various possible rulings.'" Robert L. Stern et al., *Supreme Court Practice* 659-60 (8th ed. 2002).

For the reasons given, *amicus curiae* The Chamber of Commerce for the United States therefore respectfully requests leave to file the accompanying brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents more than three million businesses and organizations in every size, sector and geographic region of the country.[1] An important function of the Chamber is to represent the interests of its members in litigation raising issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the federal Courts of Appeals, including numerous employment discrimination cases. *See, e.g.*,

[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84 (2d Cir. 2002).

The Chamber fully endorses the need to afford protection for plaintiffs seeking redress for sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. As a direct result of the incentives crafted by this Court in *Faragher* and *Ellerth*, employers have made great strides in training managers and co-workers in what constitutes appropriate conduct, implementing zero-tolerance-of-harassment policies, establishing user-friendly, effective internal complaint procedures, and vigorously investigating complaints of sexual and other harassment in the workplace.[2] By recognizing an affirmative defense to strict employer liability for companies that adopt and engage in pro-active training and remedial action,[3] this Court set in motion important behavioral incentives, for both companies and potential victim employees, that have had an enormously beneficial influence in fostering a supportive, non-harassing workplace culture for women, racial and ethnic minorities, and indeed all Americans.

The Court in *Faragher* and *Ellerth*, of course, precluded the availability of this affirmative defense when activities of supervisors constitute a "tangible employment action." This

[2] The anti-harassment policies and practices of leading companies, including JP Morgan Chase, Atlantic Richfield, the Segal Company, and Credit Suisse First Boston, are described in Sexual Harassment in the Workplace: Proceedings of New York University 51st Annual Conference on Labor (S. Estreicher ed., Kluwer Law International, 1999).

[3] An affirmative defense to hostile work environment liability exists where the employer (1) "exercise[s] reasonable care to prevent and correct promptly any sexually harassing behavior," and where the plaintiff (2) "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

critical term, while not defined, was not an open-ended invitation to judicial creativity, for the Court made clear the kinds of decisions it had in mind, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. What these actions all have in common is that they involve "company act[s]," where the company as an entity must act to effect the decision, and hence presumably notice to the company ordinarily would have preceded the decision. *Ellerth*, 524 U.S. at 762 ("A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.").

The Third Circuit's decision in *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *cert. pending* (No. 03-95), however, threatens to undermine the incentives put in motion by *Faragher* and *Ellerth*, for it broadens the concept of tangible employment action to include employee resignations that a court later characterizes as amounting to a "constructive discharge." The problem here is that a constructive discharge is simply a legal construct for treating a quit as a discharge for the limited purpose of allowing the plaintiff to argue that the quit should not be treated as a wholly voluntary act. A quit remains, however, a non-tangible employment action for purposes of the *Faragher-Ellerth* defense for it does not involve a company act that, even where some documentation may be provided, reasonably puts the company on notice of a potential claim or possible supervisor misconduct.

Current constructive discharge law recognizes the limited office of this concept. Thus, for example, there is no requirement that an employee provide notice to the employer of potential issues surrounding the quit before resigning, or as

a precondition of being able later to call the quit a "constructive discharge." The law incorporates only a standard of reasonableness, which may or may not require notice, depending on the particular circumstances of each case. The employer community is concerned that if the Third Circuit's approach is widely followed, a perverse incentive will be created to encourage employees, more interested in boosting the value of their claim than fixing the underlying problem, to resign in lieu of remaining employed and providing notice, thereby impeding an employer's ability to remedy the situation.

STATEMENT OF THE CASE

The instant case addresses a fundamental issue of importance under Title VII: whether a constructive discharge is a tangible employment action depriving an employer of the *Faragher-Ellerth* affirmative defense. It is an issue that currently divides the Courts of Appeal, and is of significance to employers nationwide.

On or about March 23, 1998, Respondent Nancy Drew Suders began working as a police communications operator ("PCO") with the Pennsylvania State Police ("State Police"). *Suders*, 325 F.3d at 436. Suders alleged that from the start of her employment, she suffered sexual harassment so severe that she felt compelled to resign *only five months later*—on August 20, 1998. She named Defendants Sergeant Eric D. Easton, Patrol Corporal William D. Baker and Corporal Eric B. Prendergast as the principal offenders.

Suders admittedly knew of the State Police's policy prohibiting sexual harassment, which was posted at her barracks and distributed to all employees. *Suders*, No. 00-1655, (M.D. Pa. Aug. 16, 2001) (Pet. App. 79a). In June 1998, and as part of her training, Suders also attended a seminar on sexual harassment led by the State Police's equal employment officer, Virginia Smith-Elliot. *Suders*, 325 F.3d

at 438. At that time, Suders told Smith-Elliot that she might need some help, but did not provide any details. *Id.* Smith-Elliot gave Suders her telephone number, but never heard from Suders until August 18, 1998, two days before her resignation. *Id.*

On August 18, Suders contacted Smith-Elliot and told her that she was being harassed.[4] According to Suders, Smith-Elliot told her to fill out a complaint form, but did not tell her where to obtain the form. According to Smith-Elliot, however, she promised to send Suders the complaint form. 325 F.3d at 438.

Two days after her conversation with Smith-Elliot, Suders resigned. The precipitating cause appears to have been an incident relating to scores she received on a computer skills test. 325 F.3d at 439. Suders' supervisors had told her that she repeatedly failed the computer skills test, but Suders had not seen her actual scores. In an effort to find the test results, she went through a drawer in the women's locker room. She found the test papers and removed them. *Id.* Once it was discovered that these papers were lost, officers dusted the drawer with theft detection powder. On August 20, 1998, Suders went back into the drawer, allegedly to return the test papers, but the powder turned her hands blue. *Id.* When confronted, she told Corporal Baker that she was resigning. Suders claimed that she was then treated as a suspect, and was photographed and questioned. Suders then turned in a letter of resignation that she had been carrying with her, and eventually was permitted to leave. *Id.*

Suders thereafter filed suit, alleging violations of Title VII; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; and the Pennsylvania Human Relations Act,

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[4] According to Smith-Elliot, Suders did not complain of sexual harassment, but complained only of age and political affiliation discrimination. *Suders*, 325 F.3d at 438.

43 Pa. Cons. Stat. Ann. §§ 951 *et seq.* After the parties completed discovery, the State Police moved for summary judgment. *Suders*, 325 F.3d at 438.

The district court granted the motion for summary judgment in its entirety. With respect to Suders' sexual harassment claim, the district court held that issues of fact existed as to whether Suders had been subject to a hostile work environment. However, the court ruled that the State Police had established an affirmative defense to vicarious liability for the actions of its supervisors. *Suders*, No. 00-1655 (M.D. Pa. Aug. 16, 2001) (Pet. App. 80a). The trial court found determinative that Suders did not give the State Police any meaningful time to respond to her complaints. The district court noted:

> Plaintiff finally did contact Smith-Elliot on August 28, 1998, however, this was only two days before she resigned. Smith-Elliot told Plaintiff to fill out a complaint form, located in the Administrative Regulation manual. However, Plaintiff resigned from her employment two days later, and the PSP was never given the opportunity to respond to any complaints of sexual harassment.

Id.

On appeal, the Third Circuit concluded that the district court erred in two respects. First, the panel held, summary judgment was inappropriate because a material dispute of fact existed as to whether the State Police exercised reasonable care to prevent or correct the sexual harassment that Suders allegedly suffered. 325 F.3d at 443. Neither the State Police nor the Chamber challenge this aspect of the appeals court's holding.

Although the Third Circuit could have ended its inquiry at this point, the court turned to what it stated was the critical issue: whether a constructive discharge, when proved, constitutes a tangible employment action.

The court acknowledged the existence of a square conflict among the Circuits on this issue. It noted that the Second and Sixth Circuits have held that a constructive discharge does not constitute a tangible employment action, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000); *Turner v. Dowbrands, Inc.*, 221 F.3d 1336 (6th Cir. 2000) (unpublished), whereas the Eighth Circuit and, to a certain degree, the Fifth Circuit have reached the opposite conclusion. *Jackson v. Arkansas Dept. of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002); *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1254 (2003).

Rejecting the reasoning set forth by the Second and Sixth Circuits, *Suders* held that a constructive discharge does constitute a tangible employment action under *Faragher* and *Ellerth*. According to the court below, when a constructive discharge is proven, the trier of fact may *not* consider the employer's *Faragher-Ellerth* affirmative defense, but instead must hold the employer strictly liable—irrespective of whether any notice of the underlying misconduct had been provided to the employer, or whether the plaintiff by invoking the internal complaint procedure effectively and promptly could have put a halt to the offending conduct.

SUMMARY OF ARGUMENT

Under *Faragher* and *Ellerth*, a constructive discharge does not constitute a "tangible employment action" for which the employer is automatically held vicariously liable for the acts of its supervisors. The Courts of Appeals have competing and irreconcilable views on this very question.

A constructive discharge, by its nature, is not the sort of "official company act," *Ellerth*, 524 U.S. at 762, for which the Supreme Court has deemed it appropriate to hold an employer strictly liable. Unless an employee reports conduct to the employer, the employer will not have an opportunity to investigate, to correct the problem, and to provide an effective remedy to the victim.

An important policy underlying both *Faragher* and *Ellerth* is that employers should encourage employees to report harassing conduct by a supervisor, and the method of encouragement selected by the Court is a rule of contingent liability for the employer. Accordingly, the employer is afforded an affirmative defense to vicarious liability when the supervisor's harassment does not culminate in a tangible employment action—*i.e.*, an "official company act" which the employer could detect even in the absence of a complaint by the affected employee.

To equate a constructive discharge with an actual termination for *Faragher-Ellerth* purposes, as the Third Circuit insisted below, distorts well-established understandings of constructive discharge doctrine. A constructive discharge is simply a legal construct for treating a quit as a discharge for the limited purpose of allowing the plaintiff to argue that his or her quit should not be treated as a wholly voluntary act. A quit remains, however, a non-tangible employment action for purposes of the *Faragher-Ellerth* defense for it does not involve a company act that, even where some documentation may be provided, reasonably puts the company on notice of a potential claim.

Constructive discharge theory does not require an employee to provide notice to an employer of sexual harassment before resigning. It only requires a standard of reasonableness. Because no notice requirement exists, no incentive exists for employees to report conduct well before quitting their employment.

ARGUMENT

A. The Courts of Appeals are Divided over Whether a Constructive Discharge Amounts to a "Tangible Employment Action" for Purposes of the *Faragher -Ellerth* Affirmative Defense.

1. The Position of the Second and Sixth Circuits.

The first federal appellate court to address whether a constructive discharge constitutes a tangible employment action after *Faragher* and *Ellerth* was the Second Circuit in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). Holding that a constructive discharge does not constitute a tangible employment action, the panel drew from this Court's reasoning in *Ellerth* the principle that "employer liability would be imposed without the possibility of an affirmative defense *only* where the employer is implicated in the harm visited upon the employee by his or her supervisor." *Caridad*, 191 F.3d at 294 (emphasis added). "Unlike demotion, discharge or similar economic sanctions"—the examples this Court gave in introducing the concept of a tangible employment action, *see Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790—"an employee's constructive discharge is not ratified or approved by the employer," explained former Chief Judge Newman for the appeals court.[5]

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[5] Moreover, as the *Caridad* court noted, 191 F.3d at 295-96, in *Ellerth* itself, "Ellerth alleged Burlington engaged in sexual harassment and forced her constructive discharge, in violation of Title VII of the Civil Rights Act of 1964." *Ellerth*, 524 U.S. at 742. In remanding the case, this Court concluded, "[a]lthough *Ellerth has not alleged she suffered a tangible employment action at the hands of Slowik*, which would deprive Burlington of the availability of the affirmative defense, this is not dispositive. In light of our decision, Burlington is still subject to vicarious liability for Slowik's activity, but Burlington should have an opportunity to assert and prove the affirmative defense to liability." 524 U.S. at 766 (emphasis added).

The Sixth Circuit is in accord. For the reasons stated in *Ellerth* and *Caridad*, the court in *Turner v. Dowbrands*, 221 F.3d 1336 (6th Cir. 2000) (unpublished), held that a "plaintiff's claim of constructive discharge did not constitute a tangible employment action" for purposes of *Faragher* and *Ellerth*.[6]

2. The Position of the Third and Eighth Circuits.

By contrast, the Eighth Circuit joins the Third Circuit in rejecting the availability of the *Faragher-Ellerth* defense because, in their view, a constructive discharge is the "functional equivalent" of an actual termination. *See Suders*, 325 F.3d at 458-59 ("in the same way as a formal discharge, a constructive discharge 'constitutes a significant change in the employment status,' by ending the employer-employee relationship"); *Jackson v. Arkansas Dept. of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001) (if the plaintiff had in fact been constructively discharged, then "the constructive discharge would constitute a tangible employment action and prevent the Department from using the affirmative defense"), *cert. denied*, 536 U.S. 908 (2002).[7]

As demonstrated above, the Courts of Appeals have competing and irreconcilable views on whether a constructive discharge constitutes a tangible employment action. Based on this conflict, this Court should grant the Petition for Writ of Certiorari.

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[6] Apparently, the First Circuit agrees that most instances of constructive discharge do not preclude invocation of the *Faragher-Ellerth* affirmative defense, but declines to adopt a flat rule. *See Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (2003) ("Here, it is clear to us that the constructive discharge label cannot be used to preclude the affirmative defense; but possibly, on rare facts, it might be appropriate for that purpose.").

[7] To like effect is dicta from the Fifth Circuit in *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405 (2002) (noting that the plaintiff "does not advance a coherent claim of constructive discharge or other tangible employment actions by [the employer"]), *cert. denied*, 123 S. Ct. 1254 (2003).

B. Treating a Constructive Discharge as an Occasion for Strict Employer Liability Undermines the Critical Behavioral Incentives this Court Fashioned in *Faragher* and *Ellerth*.

In *Faragher* and *Ellerth*, the Court confronted the question of which standard of liability should be imposed on employers when their supervisors engage in unlawful harassment. The spectrum of liability ranged from simple negligence (the standard governing co-worker harassment) to strict or "automatic" vicarious liability. To promote Title VII policies encouraging both employer internal compliance with anti-harassment mandates and claimant minimization of harm (by invoking available, effective internal procedures), the Court recognized that, save for "tangible employment actions," employer liability should be conditional, subject to an affirmative defense. The circuits recognizing a constructive discharge exception to this framework threaten to unravel the beneficial incentives for transforming workplace culture that this Court set in motion in *Faragher* and *Ellerth*.

1. A Constructive Discharge Is Not "An Official Act of the Enterprise" under *Faragher* and *Ellerth*.

This Court offered some guidance concerning the concept of tangible employment actions. Such actions must involve "an official act of the enterprise," *Ellerth*, 524 U.S. at 762, which, in most cases, "inflicts direct economic harm." *Id.* Such actions must "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. Although the examples provided by the Court of tangible employment actions were not exhaustive, constructive discharge was not listed or included. *Id.*

The rationale for holding an employer strictly liable when a supervisor's harassment culminates in discharge, demotion, or other tangible employment action is that the supervisor, by taking such action, becomes the employer's "proxy": "he 'merges' with the employer, and his act becomes that of the employer." *Faragher*, 524 U.S. at 790. Additionally, because a tangible employment action is an "official company act," *Ellerth*, 524 U.S. at 762, the Court found that the employer, in most cases, has the opportunity to review and evaluate the supervisor's action after the fact:

> A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

Id. The company may also have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes."). The underlying policy is that, by imposing unconditional strict liability for harassment culminating in a tangible employment action, employers will have a greater incentive to review and to monitor their supervisors' official decisions and actions.

This policy judgment is inapposite when an employee resigns, and later alleges a constructive discharge. What is missing is the "official company act"—an action that is documented and/or subject to review by higher management. Because the employee ultimately controls the decision whether and when to resign, and reasons need not be given (and are not required as a prerequisite to invoking a constructive discharge), the resignation may come as a complete surprise to the employer. A quit simply does not afford the employer sufficient opportunity to react and remedy a problem, because it does not put the enterprise on notice that the circumstances occasioning the quit may

involve possible supervisory misconduct. Indeed, only a rule that treats constructive discharge claims as subject to the *Faragher-Ellerth* defense creates an incentive for the claimant to put the employer on such notice.

2. The Concept of Constructive Discharge Serves Only to Supply One Element of the Plaintiff's Prima Facie Case. It Has No Bearing in Determining Those Occasions Warranting Strict Employer Liability.

To assert an action under Title VII, a plaintiff must demonstrate an "adverse employment action." *See Suders*, 325 F.3d at 435, n.1. This is a necessary element of a prima facie case under Title VII. *Id.*

An individual who voluntarily resigns from employment has not, on the face of things, suffered an adverse employment action, and therefore has no cause of action under Title VII concerning the termination from employment. A constructive discharge, however, if proven, permits a plaintiff to transform a non-actionable event—a resignation—into a potentially viable claim. Thus, a constructive discharge serves the limited purpose of supplying plaintiff with one element of the prima facie burden. *See Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) ("When a constructive discharge is found, an employee's resignation is treated—*for the purpose of establishing a prima facie case* of employment discrimination—as if the employer had actually discharged the employee.") (emphasis added).

As even the lower court in this case recognized, the concept of a tangible employment action under *Faragher* and *Ellerth* is distinct from, and much narrower than, that of an adverse employment action. *Suders*, 325 F.3d at 435, n.1 ("we understand a tangible employment action as being a narrower, more restricted category of actions occurring in the workplace"). Although *Suders* acknowledged that a tangible

employment action is a "narrow, more restricted category," its analysis of whether a constructive discharge falls into this category betrays faith with that acknowledgement. For the Third Circuit panel, the analysis effectively ended with the conclusory judgment that a constructive discharge is the functional equivalent of a termination. *See id.* at 458-59 ("in the same way as a formal discharge, a constructive discharge 'constitutes a significant change in the employment status,' by ending the employer-employee relationship.") The Third Circuit failed to consider that, in reality, the employee and employer play very different roles when an employee resigns, as opposed to when an employer effects a discharge.

As stated above, *Ellerth* was clear that a "a tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors." *Ellerth*, 524 U.S. at 762. The company may also have the opportunity to evaluate the supervisor's action before it is taken, if prior approval is required. *See id.* ("The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.").

Where an employee resigns, however, higher level management typically has no opportunity to weigh in on the employee's quit decision because the act of resignation is inherently ambiguous. There are many reasons that employees quit that have nothing to do with the employment relationship. As mentioned, employees do not always give reasons for their quit, nor is the giving of reasons required. Absent a rule effectively requiring the provision of notice to the employer—a rule offered by *Faragher* and *Ellerth* but rejected by the panel below—an employer may have no reason to suspect that misconduct of any kind prompted the quit.

Under these circumstances, strict liability is an inappropriate standard because it is the resigning employee, not

the employer, who has "acted" in any way, official or otherwise. Of course, a plaintiff may proceed with a Title VII claim via a constructive discharge theory even where no notice to the employer has occurred. But what the Third Circuit purports to foreclose is the employer's right to demonstrate that the *Faragher- Ellerth* defense is meritorious on the facts.

In short, absent the narrow category of "official act[s] of the enterprise," *Ellerth*, 524 U.S. at 762, the *Faragher-Ellerth* affirmative defense holds employers to the correct standard. Employers are brought to account when they choose to turn a blind eye towards an employee complaint, and, conversely, should be able to avoid strict liability if they take seriously their internal compliance duties by investigating and remedying claimed misconduct brought to their attention.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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